Supreme Court, U.S.
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No. 01-1081

IN THE

Supreme Court of the United States

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Petitioner,

v.

DALLAS COUNTY MEDICAL SOCIETY
and TEXAS MEDICAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOR THE FIFTH DISTRICT OF TEXAS, AT DALLAS

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

By not opposing Petitioner's arguments on the merits, Respondents' Brief in Opposition effectively concedes that the substantive questions presented by the Petition for Writ of Certiorari merit this Court's review. (Resp. Br. 1 n.1). Respondents contend only that the questions presented in the Petition were not adequately presented and preserved below. They rely primarily on *Adams v. Robertson*, 520 U.S. 83, 91-92 (1997). The record shows, however, that the Texas Court of Appeals and the Supreme Court of Texas each had "a fair opportunity to address the federal question that is sought to be presented here," in full satisfaction of the *Adams* standard. 520 U.S. at 87 (*quoting Webb v. Webb*, 451 U.S. 493, 501 (1981)).

1. This Court Has Jurisdiction under 28 U.S.C. § 1257 Because the Questions Presented Were Also Adequately Presented to the Texas Courts.

Where the state high court is silent on the federal questions presented to this Court, as the Supreme Court of Texas was in this case, Petitioner bears the burden of overcoming the assumption that those questions were not properly presented. *Adams*, 520 U.S. at 86-87. That assumption is defeated, and the questions presented are deemed to have been adequately preserved for this Court's review, if Petitioner demonstrates that he afforded the state courts a "fair opportunity" to address those questions. *Id.* at 87.

After the Texas court of appeals handed down its decision reversing the trial court on grounds Petitioner Dr. Ubiñas challenges here, he gave the Texas courts a fair opportunity to address the questions presented on the Petition. In his Motion for Rehearing to the Texas Court of Appeals, Dr. Ubiñas argued that "The Contract Clause of the United States Constitution Prevents State Action That Deprives Citizens of Their Private Contract Rights." (App. B *infra* 19a). He also argued that "This Court's Ruling Violates the Due Process Clause of the

United States Constitution. . . ." (App. B *infra* 20a). Later, in his Petition for Review to the Supreme Court of Texas, Dr. Ubiñas again argued that the "Court of Appeals' Application of the Act Violated the Contract Clause of the United States Constitution," and that its "Application of the Act Violated the Due Process and Due Course of Law Clauses of the United States and Texas Constitutions." (App. *infra* 6a).

The Texas Court of Appeals denied Dr. Ubiñas' Motion for Rehearing, and the Supreme Court of Texas chose not to review the case. Both of those courts, however, had ample opportunity to review the federal questions now presented for this Court's review.

To provide the state courts a fair opportunity to resolve federal questions, petitioners need only present those questions to the state courts with "fair precision." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (*quoted in Adams*, 520 U.S. at 87). The jurisdiction of this Court "does not depend on the citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). Indeed, this Court has held that petitioners are "not confined here to the same arguments which were advanced in the courts below." *Illinois v. Gates*, 462 U.S. 213, 220 (1983) (*quoting Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)).

Dr. Ubiñas argued to the Court of Appeals and the Supreme Court of Texas that his federal rights under the Impairment of Contracts Clause, Art. 1 § 10, and the Due Process Clause of the Fourteenth Amendment were violated. (App. *infra* 6a, 9a-13a, 19a-21a). Those courts had a fair opportunity to address those claims. The refinement of those arguments on Petition to this Court does not impede jurisdiction under 28 U.S.C. § 1257.

2. The Federal Questions Presented Here Were Timely Presented to the Texas Courts Because the Texas Court of Appeals' Decision Rested on a New and Unexpected Basis That Raised and Framed for the First Time the Constitutional Issues in This Case.

We are aware that when the federal constitutional question is clearly articulated for the first time in a state court petition for rehearing, as it was in this case, it is generally considered to have been raised too late for review in this Court. *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932). That general rule, however, does not apply when the "grounds of the [state court] decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right." *Id.* at 367. *See also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 n.9 (1980) (a federal claim is "adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation."); *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673, 677-78 (1930) (holding that a due process claim "was timely, since it was raised at the first opportunity" when first asserted in a petition for rehearing to the state court following its application of a "new construction" of a state statute).

Dr. Ubiñas won in the trial court and the Respondents challenged the judgment in the court of appeals essentially on an immunity theory. Dr. Ubiñas raised the federal questions presented for this Court's review at the first opportunity, which in this case was the Petition for Rehearing to the Texas Court of Appeals. Applying Texas, not federal law, the Texas Court of Appeals interpreted the Texas Medical Practices Act ("the Act") to preclude even injunctive and declaratory relief against health care entities engaged in peer review activities, (App Pet. 11a), effectively impairing Dr. Ubiñas' rights to a "fair and good faith proceeding" under his contract with the Respondents. No Texas court had previously interpreted the Act to provide such far-

reaching immunity. Only after that decision did Dr. Ubiñas have a basis to claim that the Act, as interpreted, violated the federal Constitutional prohibition against the impairment of contracts.

Likewise, the decision of the Court of Appeals was unprecedented in its interpretation of the Act to abrogate Dr. Ubiñas' contract right to a fair and good faith proceeding, a property interest protected by the federal Constitution. Thus, the grounds of that court's decision provided Dr. Ubiñas for the first time with an unexpected basis on which to claim that his federal rights under the Due Process and Impairment of Contracts clauses were violated. Accordingly, the Petition for Rehearing to the Texas Court of Appeals was Petitioner's first opportunity to assert his federal Due Process claim and Dr. Ubiñas properly availed himself of that opportunity.

Respondents' Opposition argues that Dr. Ubiñas raised his federal constitutional claims too late under Texas practice. (Resp. Br. 7). The federal questions presented for this Court's review, however, arise from Respondents' immunity claim, an affirmative defense that *Respondents* failed to raise clearly in the trial court. (App. Pet. 8a). In their trial pleadings, Respondents failed even to cite the code section that was eventually interpreted by the Court of Appeals to provide immunity from Dr. Ubiñas' suit to enforce his contractual rights. (App. Pet. 7a). The Texas Court of Appeals permitted Respondents to make the immunity claim for the first time on appeal, and reached an unprecedented resolution of that claim. The Texas Court of Appeals' resolution of Respondents' late-developing immunity claim is the basis for the federal questions presented for this Court's review and were properly asserted below at the first opportunity.

CONCLUSION

For the foregoing reasons, and those stated in our Petition, the judgment of the Texas Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM THE PETITION FOR REVIEW OF DR. UBIÑAS

IN THE SUPREME COURT OF TEXAS

No. _____

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Petitioner,

v.

DALLAS COUNTY MEDICAL SOCIETY
AND
TEXAS MEDICAL ASSOCIATION

Respondents.

PETITION FOR REVIEW

* * *

C. The Court Misinterpreted the Plain Language of the Act

The Act limits its protection to peer review proceedings conducted pursuant to the association's bylaws. Art. 4495b, § 1.03(a)(6) [App., tab 12.] This limitation incorporates the well-established common law contract rights afforded to association members in those bylaws, and by doing so incorporates important constitutional limitations on the association's right to claim immunity if it does not comply

with its bylaws. The threshold issue under the Act, by its very terms *and* by way of constitutional limitation, therefore, is not whether the association acted with malice, but whether the peer review proceeding qualifies for the Act's protection — an issue that requires an initial factual determination that the association complied with its agreement with its members. Only if the court finds that the association followed its bylaws does the affirmative defense of the association's absence of malice become an issue. The Medical Associations did not dispute that the DCMS' bylaws required it to provide fundamental fairness and a fair and good faith proceeding. The Court's ruling to the contrary ignores the plain language of the statute and the Texas common law upon which the requirement is based.

Issue 2: The Court of Appeals' Application of the Act Violated Dr. Ubiñas' Rights to Access to the Courts Under the United States and Texas Constitutions

The Texas Constitution provides that all courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law. TEX. CONST. art. I, §§ 13, 19 [App., tabs 17, 18.] The provision prohibits the legislature from abrogating a citizen's right to assert a well-established common law cause of action, if the legislature fails to state how the abrogation constitutes a reasonable exercise of the police power in the interest of the general welfare. *See, e.g. David McDavid Nissan, Inc. v. Subaru of America, Inc.*, 10 S.W.3d 56, 67 (Tex. App. — Dallas 1999, pet. granted). The United States Constitution, as applied to state action, provides similar protection. U.S. CONST. amends. I, XIV. [App., tabs 14, 15.]

Appendix A

A. The Court Misapplied the Doctrine of Judicial Nonintervention

The Court of Appeals held that the Texas Constitution does not grant the citizens of this state a well-established right to access to the courts to enforce a breach of contract action against their association. [App. tab 3, Opn. pp. 9-10.] TEX. CONST. art I, § 13. [App., tab 17.] The Court concluded that a contract claim against a private association based on a member's expulsion is not a well-recognized or well-defined common law action in this state because of the doctrine of judicial nonintervention, which precludes courts from interfering with a private association's internal affairs. [App., tab 3.] Opn., p. 6, *citing, inter alia, Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 176 (Tex. App — Dallas 2000, pet. denied); *Brotherhood of R.R. Trainmen v. Price*, 108 S.W.2d 239, 241 (Tex. Civ. App. — Galveston 1937, writ dism'd w.o.j.). The cases cited by the Court do not support its position, as none involve a cause of action based on the breach of a specific contract provision. Also, courts in this state consistently have distinguished between expulsion from social clubs and expulsion from associations that confer benefits that affect a member's property and liberty rights. Cases such as the *Dickey* case that involve a social club are not applicable to a case such as this one, in which the expulsion of Dr. Ubiñas will have devastating consequences on his career, as determined by the jury when it found that Dr. Ubiñas would be irreparably harmed by the expulsion. [App., tab 2.]

The Court of Appeals misapplied the doctrine of nonintervention, which has an important qualification that

is as clearly settled as the nonintervention rule: The doctrine does not apply unless the association follows its own rules. *See, e.g.*, Dorsaneo, TEXAS LITIGATION GUIDE, § 190.04[1]. The society "must confine itself to the powers vested in it, and in good faith pursue the matters prescribed by its laws, such laws not being in violation of the laws of the land, or in any alienable right of the member." *Thompson v. Grand Int'l Bhd. Of Locomotive Eng'rs*, 91 SW. 834, 837 (Tex. Civ. App. — 1905, no writ). An association's order of suspension is subject to review by a court, and its enforcement will be enjoined if it is accomplished contrary to the rules and regulations of the association. *American Inst. of Real Estate Appraisers v. Hawk*, 436 S.W.2d 359, 365 (Tex. Civ. App. — Houston [14th Dist.] 1968, no writ). Finally, the Court acknowledged that courts intervene in associations' conduct that is illegal, involves civil or property rights and are against public policy. [App., tab 3; Opn., p. 13.] A jury found that the Medical Associations acted contrary to their bylaws; they therefore acted illegally under their contractual authority. Their actions deprived Dr. Ubiñas of his civil and property rights, and are against public policy, as discussed below. The trial court properly submitted to the jury the issue of whether the Medical Associations followed their bylaws. *See, e.g., Thompson*, 91 SW. at 838.

B. The Legislature's Abrogation of Dr. Ubiñas' Claim Does Not Constitute a Reasonable Exercise of the State's Police Power

The Court of Appeals erroneously held that the Act's requirement of a showing of malice as a threshold issue promotes the public policy of having physicians review the

actions of other physicians and of affording them protection in those proceedings. [App., tab 3; Opn., p. 13.] The Court's stated policy does not apply to the facts of this case. First, the Medical Associations and their physician members who participated in the proceeding were bound by the same bylaws that bound Dr. Ubiñas, and they were aware of their contractual restrictions in conducting peer review proceedings. The Medical Associations failed to incorporate the Act's protection in their bylaws. The Court articulated no public policy that is served by applying, as it has done, the bylaws of an organization to bind the party subject to expulsion, but not to bind the members conducting the expulsion or the association that wrote the bylaws. The Court also failed to cite any case that supports its conclusion that public policy is served by the legislative or judicial rewriting of private contracts. Second, Dr. Ubiñas did not bring suit against any individual members, and did not seek damages, but rather sought the equitable relief of an injunction based on the Medical Associations' breach of contract. The stated public policy of protecting peer review proceedings — to foster open and frank communications by physicians without the threat of retaliation — does not apply. Third, courts and Congress have recognized that abuse can occur if physicians who suffer wrong by a peer review committee are denied all judicial remedies, particularly where the physicians compete with one another. *See, e.g., Imperial v. Suburban Hosp. Assoc. Inc.*, 37 F.3d 1026, 1031 (4th Cir. 1994). Finally, the Court of Appeals' application of the Act violates public policy, as it deprives Dr. Ubiñas of his rights in violation of the contract and due process clauses of the United States Constitution, and the due course of law provision of the Texas Constitution, as discussed below.

Issue 3: The Court of Appeals' Application of the Act Violated the Contract Clause of the United States Constitution

The contract clause of the United States Constitution states, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10, cl. 1. [App., tab 16.] The Court's interpretation of the Act renders it unconstitutional under the contract clause, as it applied the statute in void a contract obligation; in doing so the Court effected a change in the law that substantially impaired the contract. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234,250(1978) (invalidating a Minnesota statute that required an employer that closed its office to pay a pension funding charge); *United States Trust Co. v. New Jersey*, 431 U.S. 1(1977) (invalidating a New Jersey statute that altered a statutory bond covenant relied upon by bond purchasers). The Court's action is not justified as reasonable and necessary to serve an important public purpose, as previously discussed. Courts must construe statutes in accordance with the contract clause. *See, e.g., Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 723 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (1975). Application of the Act to defeat Dr. Ubiñas' contract rights violates the contract clause.

Issue 4: The Court of Appeals' Application of the Act Violated the Due Process and Due Course of Law Clauses of the United States and Texas Constitutions

The due process clause of the United States Constitution and the due course of law clause of the Texas Constitution preclude states from passing laws that deprive citizens of

their property rights, defined as "existing rules or understandings that stem from an independent source such as state law." U.S. CONST. amend. XIV; *Galvin v. New York Racing Ass'n*, 70 F.Supp.2d 163, 172-73 (E.D.N.Y. 1998), *aff'd*, 166 F.3d 1200 (2nd Cir. 1998); TEX. CONST. art. 1, § 19 [App., tabs 15, 18.] The suspension of credentials that affect an individual's ability to pursue his career implicates property interests. *Id.* Also a physician's contractual right to a hearing in actions that affect his medical career is a protected property interest. In such a case, the bylaws provide the procedure to be followed before a hospital authority can take disciplinary action. *See, e.g., Northeast Georgia Radiological Assocs. v. Tidwell*, 670 F.2d 507, 510 (5th Cir. 1982). A physician also has a protected liberty interest in such a case, as the term "liberty" for purposes of the Fourteenth Amendment extends to the right to practice any of the common occupations of life. *Shaw v. Hospital Auth. of Cobb County*, 507 F.2d 625, 628 (5th Cir. 1975). The Court applied the Act to deprive Dr. Ubiñas of his valuable property interest — his Contract Rights — and his right to the liberty to pursue his chosen profession. The Court's application of the Act to deprive him of those rights constitutes state action that violates the due process and due course of law clauses of the United States and Texas Constitutions. U.S. CONST. amend. XIV; TEX. CONST. art. 1, § 19 [App., tabs 15, 18.]

* * * *

APPENDIX B — EXCERPTS FROM THE MOTION FOR REHEARING OF DR. UBIÑAS

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

No. 05-97-00027-CV

DALLAS COUNTY MEDICAL SOCIETY AND
TEXAS MEDICAL ASSOCIATION,

Appellants,

v.

EMMANUEL E. UBIÑAS-BRACHE, M.D.,

Appellee.

APPELLEE'S MOTION FOR REHEARING

* * *

To the Honorable Court of Appeals:

Appellee Emmanuel Ubiñas-Brache ("Dr. Ubiñas") submits his motion for rehearing and asks the Court to reconsider its ruling reversing the trial court's judgment.

Appendix B

ISSUES PRESENTED FOR REVIEW

Issue 1: Does this Court's application of the Texas Medical Practice Act ("Act") to deprive Dr. Ubiñas of his claim for breach of contract violate the First and Fourteenth Amendments to the United States Constitution and the open courts provision of the Texas Constitution?

Issue 2: Does this Court's application of the Act to deprive Dr. Ubiñas of his contract rights violate the contract clause of the United States Constitution?

Issue 3: Does this Court's application of the Act to deprive Dr. Ubiñas of property and liberty rights without just compensation violate the due process clause of the United States Constitution and the due course of law clause of the Texas Constitution?

Issue 4: Did this Court err by interpreting the Act to provide Appellants with absolute immunity, absent a showing of malice?

Issue 5: Did this Court err by holding that the Act precludes injunctive relief when an association violates its bylaws?

STATEMENT OF FACTS

The Court of Appeals summarized the following facts. In 1984, Dr. Ubiñas joined the DCMS; membership in the DCMS is voluntary; each member must "agree" to be bound by the DCMS disciplinary procedures; Dr. Ubiñas brought suit based on breach of contract and violations of common law rights to due process; Dr. Ubiñas sought an injunction

only; a jury found that Appellants failed to provide Dr. Ubiñas with fundamental fairness and a fair and good faith proceeding, and Appellants' failure caused Dr. Ubiñas irreparable harm; the trial court enjoined Appellants from expelling Dr. Ubiñas. Opinion, pp. 1-2.

ARGUMENT AND AUTHORITIES

Overview: This Court's Holdings Present Constitutional Issues of First Impression

This Court has, in the name of judicial nonintervention, entered a ruling that constitutes the ultimate judicial intervention: It has rewritten the terms of a contract between private parties. This Court has applied the Texas Medical Practice Act ("the Act") to defeat Dr. Ubiñas's valuable contract right to fundamental fairness and a fair and good faith proceeding ("Contract Rights"), and held that those rights are not enforceable in the state of Texas. This Court went even further, and held that a physician can never enforce his contract rights against a private medical association in connection with a peer review proceeding unless he first pleads and proves malice. Opinion, p. 7. In doing so, the Court has ignored the Act's clear language that provides that the malice threshold is not available to medical associations unless they first comply with their own bylaws in conducting peer review proceedings. Tex. Rev. Civ. Stat. Ann. art. 4495b ("Tex. Med. Prac. Act."), §§ 1.03(a)(6), 5.06(1), (m). The Court has failed to cite a single case to support its holding, as none of the cited cases involved a court's interpretation of a medical association's contract to provide its members with a higher standard than the absence-of-malice standard

provided by the Act. The Court thus applied a state statute to deprive a citizen of a valuable contract right in violation of the Texas and United States Constitutions.

Issue 1: This Court's Ruling Violates the Open Courts Provision of the Texas Constitution and the First and Fourteenth Amendments

A. The Ruling

This Court has held that the open courts provision of the Texas Constitution does not protect Dr. Ubiñas' breach of contract action, based on an express covenant, to maintain his membership in Appellant DCMS. The Court first concludes that a contract claim against a private association based on a member's expulsion is not a well-recognized or well-defined common law action in this state because of the doctrine of judicial nonintervention. Opinion, p. 6, *citing Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 176 (Tex. App. — Dallas 2000, pet. denied); *Brotherhood of R.R. Trainmen v. Price*, 108 S.W.2d 239, 241 (Tex. Civ. App. — Galveston 1937, writ dism'd w.o.j.). The two cases cited by the Court do not support its position, however, as neither holds that the doctrine of judicial nonintervention applies to protect an association from a cause of action based on its breach of its bylaws in conducting disciplinary action against a member. Also, courts in this state have consistently distinguished between expulsion from social clubs and expulsion from associations that confer benefits that affect a member's property and civil rights. The *Dickey* case involves a social club; it is not applicable to a case such as this one, in which the expulsion of a physician from a medical society will have

devastating consequences on his career. The Court then holds that the Act bars Dr. Ubiñas' contract claim altogether, absent a showing of malice. The Court concludes that the legislature substituted a higher threshold standard of malice for contesting the actions of private associations involved in medical peer review. The Court concludes that the substitution is reasonable, in light of the Court's interpretation of common law to present other hurdles in pursuing actions concerning membership in a private voluntary association. In so holding, the Court also concludes that the malice threshold promotes the public policy of having physicians review the actions of other physicians and of affording some protections for the participants in those proceedings. Opinion, p.7. The Court's ruling conflicts with the plain language of the statute, and with well-established Texas law, as discussed below.

B. The Open Courts Provision of the Texas Constitution and the First and Fourteenth Amendments to the United States Constitution

All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law. TEX. CONST. art. I,. §§ 13, 19. The legislature may not abrogate the right to assert a well-established common law cause of action. *David McDavid Nissan, Inc. v. Subaru of America, Inc.*, 10 S.W.3d 56, 67 (Tex. App. — Dallas 1999, pet. granted). The United States Constitution, as applied to state action, provides similar protection. U.S. CONST. amends. I, XIV. A contract claim is a well-established common law cause of action. Where breach of an agreement does not constitute the breach

of a statutory provision, and the statute provides no other remedy in place of the common law claims, and the legislature fails to state how the abrogation of such a claim constitutes a reasonable exercise of the police power in the interest of the general welfare, the statute violates the open courts provision of the Texas Constitution. *David McDavid Nissan*, 10 S.W.3d. at 67.

C. Breach of an Association's Bylaws Gives Rise to a Claim for Breach of Contract

1. Texas Law Is Well-Recognized and Well-Defined

Courts in England and the United States long have interpreted the bylaws and rules of voluntary associations as contracts between an organization and its members, and that they provide enforceable contract rights. *See, e.g.*, F. Eric Fryar, Note, *Common Law Due Process Rights in the Law of Contracts*, 66 Tex. L. Rev. 1021, 1043 (1988). An expelled member seeking reinstatement will obtain a court hearing on the merits of his claim by alleging that the expulsion violated the association's own constitution, bylaws, rules or regulations. *Id.*, at 1043-44; William V. Dorsaneo III,12 TEXAS LITIGATION GUIDE §§ 190.01[3], 190.01[4], 190.02[1], 190.04[1], 190.04[2] (2000), *citing, e.g. Consolidated Forwarding Co. v. Union Truck Depot*, 356 S.W.2d 693, 696 (Tex. Civ. App. — Dallas 1962, no writ). This Court has ignored these well-established principles, first articulated by the Texas Supreme Court in 1884: ". . . [I]t has been generally held that clubs or societies, whether religious, literary or social, have the right to make their own rules upon the subject of the admission or exclusion of members, and these rules

may be considered as articles of agreement to which all who become members are parties." *Manning v. The San Antonio Club*, 63 Tex. 166, 1885 WL 7009 at *4 (1884). The association's constitution is a basic contract upon which the member's rights are based. *See, e.g., Taylor v. United States Ass'n of Journeymen, et al.*, 337 S.W.2d 421, 423-24 (Tex. Civ. App. — Fort Worth 1960, writ ref'd n.r.e.). The right to apply to the courts for redress of such injuries exists in favor of all citizens, and cannot be abridged by an association except by the consent of the member. *See, e.g. Lawrence v. Ridgewood Country Club*, 635 S.W.2d 665, 666-67 (Tex. App. — Waco 1982, writ ref'd n.r.e.) (noting that courts will intervene where associations breach their bylaws); *Musicians Protective Ass'n, Local 466 v. Semon*, 254 S.W.2d 211, 214 (Tex. Civ. App. — El Paso 1952, writ ref'd) (noting that constitution and bylaws of unions constitute a contract with the members and are binding on the union); *Jeffersonian Club v. Waugh*, 217 S.W.2d 103, 107 (Tex. Civ. App. — Galveston 1949, writ ref'd n.r.e.) (holding that, by joining an association, its members agree to settle disputes that arise in the method provided for in the constitution and bylaws).

2. Texas Courts Imply Contractual Rights to Due Process in Association Contracts

The common law of Texas, in addition to granting the citizens of this state a cause of action for breach of the express terms of a contract arising from an association's breach of its bylaws, also has long provided that members may seek judicial relief against their associations where property or civil rights are involved. The Texas Supreme Court articulated this rule in 1884, stating, "When membership in

certain societies confers upon the individual important benefits, as in aid societies, benevolent societies, etc., or peculiar advantages in trade and business, as in chambers of commerce, these are important and valuable rights which are protected by the law of the land, and are generally secured in some way by the charter of incorporation." *Manning*, 63 Tex. 166, 1885 WL 7009 at *4. When membership in an organization entitles its members to benefits, the member is deprived of pecuniary value upon his expulsion. *See, e.g., Thompson v. Grand Int'l Bhd. of Locomotive Eng'rs*, 91 S.W. 834, 836 (Tex. Civ. App. — 1905, no writ); *accord Jeffersonian Club*, 217 S.W.2d 103 at 108 (noting that questions for a court to pass on are those involving property or civil rights).

Courts also long have applied common law procedural limitations to the exercise of discretion by voluntary associations over their members, particularly when they discipline members. Fryar, 66 Tex. L. Rev. at 1042-43. Both the history and the operation of common law due process unmistakably mark it as a concept of contract law, and have implied the right to due process in the associations' bylaws, and thus the contracts, with their members. *Id.* at 1043. This Court did not explain why expulsion from a medical society does not involve protected rights, particularly as Appellants throughout this proceeding have acknowledged Dr. Ubiñas' right to due process. This Court, by ruling that physicians have no common law right to bring a claim for breach of contract against a medical society to challenge a peer review proceeding, has applied the Act to overturn two well-recognized common law rules, first, that association members have well-recognized contract rights created by their

associations' bylaws, and second, that Texas law will imply in those contracts a minimum right to due process in the conduct of disciplinary proceedings, where civil or property rights are involved. Dr. Ubiñas was entitled to more than the minimum due process rights; he had an express contractual right to a fair and good faith proceeding.

3. This Court Has Misapplied the Doctrine of Judicial Nonintervention

This Court relies upon the doctrine of nonintervention to reverse the jury's finding that Dr. Ubiñas was not afforded his Contract Rights as required under Appellants' bylaws. The doctrine, however, has an important qualification, which is as clearly settled as the nonintervention rule, that the society "must confine itself to the powers vested in it, and in good faith pursue the matters prescribed by its laws, such laws not being in violation of the laws of the land, or in any alienable right of the member." *Thompson*, 91 S.W. at 837. The doctrine of nonintervention does not apply unless the association follows its own rules. *See, e.g.*, Dorsaneo, TEXAS LITIGATION GUIDE, § 190.04[1]. The trial court properly submitted to the jury the issue of whether Appellants followed their own rules. *See, e.g., Thompson*, 91 S.W. at 838. An association's order of suspension is subject to review by a court, and its enforcement will be enjoined if it is accomplished contrary to the rules and regulations of the association. *American Inst. of Real Estate Appraisers v. Hawk*, 436 S.W.2d 359, 365 (Tex. Civ. App. — Houston [14th Dist.] 1969, no writ). The doctrine of judicial non-intervention does not apply to the issue of whether an association breached its bylaws.

D. The Public Policy Rationale Cited by the Court Does Not Apply in This Case

This Court held that the Act precludes all causes of action against associations based on peer review proceedings, absent a showing of malice as a threshold issue, concluding that this threshold promotes the public policy of having physicians review the actions of other physicians and of affording them protection in those proceedings. The Court's stated policy does not apply for several reasons. First, the Act does not provide that all peer review proceedings are protected, as it limits the Act's protection to those proceedings conducted in accordance with the bylaws of an association. Tex. Med. Prac. Act, § 1.03(a)(6). This limitation incorporates the well-established common law contract rights afforded to association members in those bylaws. The threshold issue under the Act, by its very terms, therefore is not whether the association acted with malice, but whether the peer review proceeding qualifies for the malice protection, an issue that requires an initial determination that the association followed its own bylaws. Only if the court finds that the association followed its bylaws — a fact question — does malice come into play. The parties did not dispute that the bylaws at issue provided for fundamental fairness and a fair and good faith proceeding. If the bylaws did not have such a requirement, Texas common law would have implied a minimum right to due process, a lower standard than the right to fundamental fairness and a fair and good faith proceeding. This Court's ruling reads out of the Act the statutory requirement that the bylaws must be followed, a requirement based on over a century of common law in this state. The Court's ruling therefore contradicts the plain language of the statute, and its ruling contradicts the stated public policy of the

legislature. Second, Appellants and their physician members who participated in the proceeding were bound by the same bylaws that bound Dr. Ubiñas, and they were aware of their contractual restrictions in conducting peer review proceedings. A jury found they breached their contract. There is no public policy served by applying, as this Court has done, the bylaws of an organization to bind the party subject to expulsion, but not to bind the members conducting the expulsion or the association that wrote the bylaws. Appellants had, and have, a simple solution: Rewrite their bylaws. They do not require legislative action to do so, and no public policy is served by legislative or judicial rewriting of private contracts. Third, Dr. Ubiñas did not bring suit against any individual members, and did not seek damages, but rather sought only the equitable relief of an injunction based on Appellants' breach of contract. The stated public policy of protecting peer review proceedings — to foster open and frank communications by physicians without the threat of retaliation — does not apply. Finally, this Court has cited no case to support its application of a public policy, contrary to the plain language of a statute, to void the terms of a private contract. To the contrary, such an application of the Act is against public policy, as it violates the contract and due process clauses of the United States Constitution, and the due course of law provision of the Texas Constitution. In so applying the Act, this Court has erroneously interpreted the Act, and in doing so has rendered the Act unconstitutional, under the Texas and United States Constitutions.

Appendix B

Issue 2: The Contract Clause of the United States Constitution Prevents State Action That Deprives Citizens of Their Private Contract Rights

The contract clause of the United States Constitution states, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10, cl. 1. This Court has applied the Act to void not only section 1.03(a)(6) of the Act, and the well-settled Texas law upon which that section is based, but also to void Appellants' contractual obligation to Dr. Ubiñas. In doing so, this Court has overturned a jury finding of fact that Appellants failed to perform their contractual obligation. This Court's interpretation of the statute renders it unconstitutional under the contract clause of the United States Constitution, as it has applied the statute to void a contract obligation; in doing so the Court effected a change in the law that impaired the contract; and the impairment was substantial. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250, 98 S. Ct. 2716, 2725, 57 L. Ed.2d 727 (1978) (invalidating a Minnesota statute that required an employer that closed its office to pay a pension funding charge); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 32, 97 S. Ct. 1505, 1523, 52 L. E.2d 92 (1977) (invalidating a New Jersey statute that altered a statutory bond covenant relied upon by bond purchasers). This Court's application of the Act to impair a contract is not justified as reasonable and necessary to serve an important public purpose, as discussed in Issue 1, above. As stated, there can be no public policy served in rewriting the private contract at issue, as Appellants had a simple solution: They could have rewritten their bylaws. A statute is not to be construed as making any innovation upon the

common law which it does not fairly express. *See, e.g., Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-05 (1959). This Court must construe the Act in accordance with the contract clause, and hold that application of the Act to defeat Dr. Ubiñas' contract rights violates his constitutional rights. *See, e.g., Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 723 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (1975).

Issue 3: This Court's Ruling Violates the Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Texas Constitution

The Fourteenth Amendment to the United States Constitution, the due process clause, protects property rights as defined by "existing rules or understandings that stem from an independent source such as state law." *Galvin v. New York Racing Ass'n*, 70 F.Supp.2d 163, 172-73 (E.D.N.Y. 1998), *aff'd*, 166 F.3d 1200 (2nd Cir. 1998) (concluding that the suspension of credentials that affect an individual's ability to pursue his career implicates property interests). A physician has protected property interests in his contractual right to a hearing in actions that affect his medical career. In such a case, the bylaws provide the procedure to be followed before a hospital authority can take disciplinary action. *See, e.g., Northeast Georgia Radiological Assocs. v. Tidwell*, 670 F.2d 507, 510 (5th Cir. 1982). The physician also has a protected liberty interest in such a case, as the term "liberty" for purposes of the Fourteenth Amendment extends to the right to practice any of the common occupations of life. *Shaw v. Hospital Auth. of Cobb Co.*, 507 F.2d 625, 628 (5th Cir. 1975). This Court has applied the Act to deprive Dr. Ubiñas

of his valuable property interest, his contractual right to fundamental fairness and a fair and good faith proceeding, which in turn directly impacts his liberty interests, as it limits his right to pursue his chosen profession. The Court's application of the Act violates the due process clause of the United States Constitution and the due course of law clause of the Texas Constitution.

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